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"DOUBTS ABOUT OUR PROCESSES": RICHARD D. SIMONS AND THE JURISPRUDENCE OF RESTRAINT IN STATE CONSTITUTIONAL ANALYSIS

David E. McCraw*

In one of his last major writings on state constitutional analysis, Judge Richard D. Simons of the New York State Court of Appeals set forth plainly the constitutional issue that most consumed him during his fourteen year tenure on the court:

> As Judge Kaye notes [in her majority opinion], neither the Court nor its individual Judges have consistently followed any announced standards for departing from Federal law to adopt a different State rule or settled on any preferred methodology for doing so (*but see*, People v. P.J. Video, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 [(1986), *cert. denied*, 479 U.S. 1091 (1987)]). . . . Indeed, the Court recently has appeared to shy away from establishing any standards and, without guidance from us, parties have been free in cases asserting both Federal and State constitutional claims to rely on the general equities of the case, to appeal to the subjective views of the individual Judges on what the rule ought to be and to urge adoption of the methodology best suited to arrive at the desired result. Hopefully we will, in time, achieve an articulable consensus on how these matters should be handled.[1]

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To review Judge Simons' state constitutional writing is to return time and again to that issue and, more particularly, to a single theme: the court needs to find uniform standards and methodologies if it is to ensure that its state constitutional decision-making is orderly and institutional, not erratic and personal. It is, in some ways, a curious legacy for a judge, seemingly focused as it is on the esoterica of process and jurisprudence rather than the heartland of substantive law -- on *how* and *whether* state constitutional analysis should be undertaken rather than on *what* results it should spawn. Indeed, though state constitutional interpretation has been perhaps the single most divisive issue in the modern history of the court of appeals[2] and Judge Simons was at the center of the debate, his disagreement was rarely with the outcome of the case and almost always with the process of getting there. In his six most significant writings on the interplay between the state and federal constitutions, there are three concurrences, three majority opinions, and no dissents.[3]

Yet for all of its discussion of process and decision-making, Judge Simons' constitutional writing was not merely about the mechanics of the court and its business, but instead arose from

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1. Immuno AG v. Moor-Jankowski, 77 N.Y.2d 235, 262 n.2, 567 N.E.2d 1270, 1286 n.2, 566 N.Y.S.2d 906, 922 n.2 (Simons, J., concurring), *cert. denied*, 500 U.S. 954 (1991).

2. *See* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at the New York Court of Appeals*, 12 TOURO L. REV. 633 (1996).

3. *See* People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985); People v. P.J. Video, Inc., 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987); Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 71, 510 N.E.2d 325, 331, 517 N.Y.S.2d 456, 463 (1987) (Simons, J., concurring); Town of Islip v. Caviglia, 73 N.Y.2d 544, 540 N.E.2d 215, 542 N.Y.S.2d 139 (1989); People v. Vilardi, 76 N.Y.2d 67, 78, 555 N.E.2d 915, 921, 556 N.Y.S.2d 518, 524 (1990) (Simons, J., concurring); *Immuno*, 77 N.Y.2d at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918 (Simons, J., concurring); People v. Harris, 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991).

and articulated his views on two bedrock issues of jurisprudence: first, the proper role of state courts in a dual-sovereign, dual-constitution system and, second, the way in which courts attain and preserve institutional legitimacy over time and through changes in their membership. What emerges from a close reading of Judge Simons' opinions is a consistent belief that while the court undeniably has the freedom to use the state constitution to act independently of the United States Supreme Court and the Federal Constitution, it is a freedom that should be used sparingly and reluctantly, only as a last resort when a principled reason compels the court to do so. His concern, in essence, was that the state constitution could too easily become the forbidden fruit of a state's highest court: the alluring temptation to conjure up new law at will, freed from the normal restraints of precedent, legislative reversal, and appellate review. As Judge Simons bluntly stated in one concurrence:

> [t]he majority merely finds arguments rejected by the [U.S. Supreme Court] more persuasive than those adopted by the court. That is within its power but a disagreement with the highest court in the land based solely on a preference for another rule when the provisions of the two Constitutions read the same raises doubts about our processes and creates instability and uncertainty in our law.[4]

THE SEARCH FOR AN ANALYTICAL METHODOLOGY

Judge Simons' tenure at the court, from January 1983 to December 1996, coincided with the emergence of state constitutional analysis as a nationwide phenomenon. In what scholars have labeled the "new judicial federalism," state high courts over the past two decades have regularly looked to their own state constitutions to find greater protection of personal

4. *Vilardi*, 76 N.Y.2d at 86, 555 N.E.2d at 926, 556 N.Y.S.2d at 529.

liberty than that afforded by the Federal Constitution.[5] While frequently the state courts' "discovery" of their own constitutions came as a direct response to conservative rulings by the post-Warren Supreme Court, New York has had a longer history of independent constitutional decision-making.[6] Nonetheless, the period of Judge Simons' term stands as a high water mark for state constitutional adjudication in New York, most notably in the areas of free expression, search and seizure, and the rights of the accused.

Judge Simons' first opinion rejecting a federal constitutional decision in favor of a higher state standard came in *People v. Bigelow*,[7] a decision that stands in stark contrast to his later writings. In *Bigelow*, police officers had conducted a search believing they had a valid warrant. In fact, probable cause had not been legally established before the magistrate. Under the Supreme Court precedent, *United States v. Leon*,[8] suppression of evidence from the search would not have been required so long as the police acted in good faith. The New York Court of Appeals, however, decided to suppress the evidence on state constitutional grounds, criticizing *Leon* as providing an incentive for lawless police acts.[9]

What makes *Bigelow* exceptional in retrospect is the perfunctory analysis of Judge Simons' majority opinion. *Leon* is disposed of and the alternate state rule established in a single paragraph without so much as a passing reference to the particular state constitutional section at issue.[10] The rationale for rejecting *Leon* points to no unique New York cases, circumstances, or history, but instead finds the federal rule unacceptable on public policy grounds. None of the restraining

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5. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841 (1991).

6. Vincent M. Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31 (1989).

7. 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985).

8. 468 U.S. 897 (1984).

9. 66 N.Y.2d at 427, 488 N.E.2d at 458, 497 N.Y.S.2d at 637.

10. *Id.*

analytical framework that would mark Judge Simons' later decisions is to be found.

THE P.J. VIDEO APPROACH

That changed dramatically less than a year later in *People v. P.J. Video, Inc.*[11] As in *Bigelow*, the court in *P.J. Video* found a search warrant application invalid as a matter of state law even though it had met the federal constitutional standard for probable cause. More significant than its substantive holding is the decision's lengthy discussion of state constitutional analysis. Writing for the majority, Judge Simons for the first time attempted to set out an analytical framework for determining whether the state constitution affords greater protection than the Federal Constitution. His plain intention was to create a scheme that could be used irrespective of the right in question, not solely in the context of search and seizure cases.

P.J. Video posits two bases for finding a deviation between similar provisions in the Federal Constitution and state constitution: "interpretive review" and "noninterpretive review."[12] The former applies when the language of the two constitutions differ. In undertaking an interpretive review, a court should consider:

> (a) whether the state constitution expressly recognizes a right not found in the similar federal provision;
>
> (b) whether the language of the state constitution is "sufficiently unique to support a broader interpretation of the individual right;"
>
> (c) whether the history of the state constitutional text reveals the drafters' intention to exceed the federal standard or to be coextensive with it; and

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11. 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907.
12. *Id.* at 302-03, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

(d) whether the "very structure and purpose" of the state constitution can be viewed as affirming certain rights and not merely restraining the state's power.[13]

A noninterpretive analysis is called for, on the other hand, when the state and federal provisions are textually indistinguishable. Despite the similarity in language, a higher state standard may be warranted, according to *P.J. Video*, as a matter of "sound policy, justice and fundamental fairness."[14] Among the factors to be considered by the court are:

(a) how state statutory and common law has defined the scope of the right;

(b) the degree to which the State has historically or traditionally protected the right;

(c) whether the state constitution has identified the right as one of "peculiar State or local concern"; and

(d) whether there exist "distinct attitudes of the State citizenry toward the definition, scope or protection of the individual right."[15]

In finding the search and seizure in *P.J. Video* unconstitutional as a matter of state law, the court employed the newly articulated noninterpretive prong of the framework. Even as it broke new ground, the analysis in the case was prototypical of Judge Simons' emerging philosophy of judicial restraint in state constitutional interpretation -- most specifically, the need to find concrete, articulable reasons in New York precedents, statutes, or history to adopt a rule that differed from the federal rule. In *P.J. Video*, a magistrate had determined that there was probable

13. *Id.*
14. *Id.*
15. *Id.*

cause to suspect that defendants were selling obscene materials based on a warrant application that contained only the officer's itemized list of the sexual acts depicted.[16] This was insufficient, the court of appeals explained, because under the state's penal code, offensive, explicit depictions of sexual conduct are not obscene unless they appeal only to the prurient interest when considered as a whole and judged by community standards.[17] Put directly, an itemized list of depicted acts gave the magistrate no basis for determining whether probable cause existed as to these other statutory elements of the crime. The court, in approving of the warrant application, concluded that because the federal constitutional standard ignored parts of the New York statutory scheme, a higher state standard was required.[18]

But putting the outcome aside, the interpretive/noninterpretive framework set forth in *P.J. Video* was unprecedented. No prior New York decision had attempted to articulate a coherent scheme for undertaking independent state constitutional review; not a single New York case is cited to support any aspect of the framework. The principal source for the scheme is, in fact, an article in University of Texas Law Review by Earl M. Maltz, a professor at Rutgers School of Law.[19] While *P.J. Video* itself is barren of any discussion of *why* a comprehensive analytical framework of any sort was needed, the Maltz article is telling. At a time when most scholars were unabashedly enthusiastic in their support for expansive use of state constitutions to depart from federal precedents, Professor Maltz struck a discordant note of concern. He concluded:

> [T]he additional layer of noninterpretive review is of questionable value. For the most part, that layer will merely duplicate already existing federal review, while decreasing the

16. *Id.* at 300-01, 501 N.E.2d at 559, 508 N.Y.S.2d at 910.

17. *Id.* at 308, 501 N.E.2d at 564, 508 N.Y.S.2d at 915.

18. *P.J. Video*, 68 N.Y.2d at 308, 501 N.E.2d at 564, 508 N.Y.S.2d at 915.

19. Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985).

ability of local legislatures to respond to changing conditions and increasing uncertainty about the scope of constitutional rights.[20]

AFTER P.J. VIDEO

While that skepticism about state constitutional analysis was left unspoken in Judge Simons' opinion in *P.J. Video*, it would become obvious in his later writings as he attempted over the next decade to institutionalize in the court's jurisprudence the interpretive/noninterpretive analysis spelled out in *P.J. Video*. In his 1990 concurrence in *People v. Vilardi*, a case involving the prosecutor's obligation to turn over exculpatory material to the defense, Judge Simons complained that the majority decided to adopt a rule at odds with federal constitutional law simply because it disagreed with the United States Supreme Court.[21] By failing to give serious attention to the *P.J. Video* analysis, which by then had been incorporated into other court of appeals decisions,[22] the majority "raise[d] doubts" about the court's processes and created instability and uncertainty in the law, in Judge Simons' view.[23]

The *Vilardi* concurrence made explicit the point suggested implicitly in *P.J. Video*: that there should be specific, articulable reasons in New York precedents, statutes, or history for adopting a state constitutional interpretation that diverges from the federal Constitution. Judge Simons asserted that the court had been willing to depart from the United States Supreme Court's decisions in only three kinds of situations: (1) when the Supreme Court has retreated from its own prior rulings or had established a rule that was at odds with New York law; (2) when New York

20. *Id.* at 1023.

21. *Vilardi*, 76 N.Y.2d at 84, 555 N.E.2d at 924, 556 N.Y.S.2d at 527-29.

22. *See, e.g.*, People v. Kohl, 72 N.Y.2d 191, 197, 527 N.E.2d 1182, 1185, 532 N.Y.S.2d 45, 48 (1988); People v. Alvarez, 70 N.Y.2d 375, 378-79, 515 N.E.2d 898, 899, 521 N.Y.S.2d 212, 213-14 (1987).

23. *Vilardi*, 76 N.Y.2d at 86, 555 N.E.2d at 926, 556 N.Y.S.2d at 529.

common law in a particular area had been fully developed and the court of appeals decided to constitutionalize it; and (3) when there were "concerns peculiar to New York State residents" that dictated an independent New York rule.[24] In each of those instances, there was a concrete, precedent-based reason, extending beyond the judicial preferences of the current members of the bench, for moving in a different direction from the Supreme Court.

The textbook example of the court's application of that principle is Judge Simons' majority opinion in *People v. Harris*.[25] *Harris* raised the issue of whether the defendant's confession to police at the stationhouse should have been suppressed because he had been arrested an hour earlier in his home without a warrant. In 1988, the court of appeals had suppressed the confession as the fruit of the illegal arrest on federal grounds, only to be reversed by the United States Supreme Court.[26] On remand, the court of appeals once again voted to suppress, this time on state constitutional grounds. The critical factor for Judge Simons was the presence of specific, unique New York law that was incompatible with the federal holding of the Supreme Court.

Specifically, the Supreme Court had concluded that suppression would have little deterrent effect on the type of illegal police behavior involved. The Court reasoned that because probable cause existed and the suspect could legally have been arrested outside his home, the officers' failure to obtain a warrant had a tenuous connection to their desire to secure a confession.[27] In rejecting that reasoning on remand, the court of appeals relied upon a significant distinction between New York and federal law. Under federal law, the right to counsel did not necessarily attach at the issuance of an arrest warrant; in New York, it did. Thus, a suspect could not be questioned under New York law without

24. *Id.* at 83, 555 N.E.2d at 924, 556 N.Y.S.2d at 527.

25. 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702.

26. *See* People v. Harris, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988), *rev'd*, 495 U.S. 14 (1989).

27. *Harris*, 77 N.Y.2d at 436-37, 570 N.E.2d at 1052, 568 N.Y.S.2d at 703.

counsel present once a warrant was issued.[28] In practice, then, while police had little reason under the federal rules to forgo a warrant in hopes of obtaining a confession, the incentive to do so was much greater under the New York rules. Thus, the court of appeals concluded, the suppression would deter illegal police conduct, and an independent state rule was justified.[29]

Ironically, the most expansive and controversial discussion of Judge Simons' philosophy of judicial restraint came in a decision that he did not write. In 1992, in two companion cases involving search and seizure issues, *People v. Scott* and *People v. Keta*,[30] the court, which had long been known for its collegiality, divided bitterly and publicly over the majority's decision to reject federal precedents and decide the cases under the New York constitution. More notable than the outcomes -- the majority ordered suppression in both instances -- was the internal battle over state constitutional analysis. Judge Bellacosa, in a dissent joined by Judge Simons and former Chief Judge Wachtler, blasted the majority for "supplanting" the court's noninterpretive method of analysis.[31] Relying largely on Judge Simons's decisions in *P.J. Video* and the *Harris* remand, Judge Bellacosa argued that the majority had failed to provide the "sufficient reason" required by those decisions to depart from the United States Supreme Court's holdings.[32] He criticized the majority for failing to take into account the need for "some disciplined analytical method to provide precedential guidance and to justify the desired outcome by reasoned articulation."[33] Without that disciplined method, the dissent asserted, the court "in effect creates a new echelon of state constitutional analysis which may be deployed whenever any future majority of this Court simply chooses to differ with a

28. 77 N.Y.2d at 439-40, 570 N.E.2d at 1054, 568 N.Y.S.2d at 705.

29. *Id.* at 440-41, 570 N.E.2d at 1055, 568 N.Y.S.2d at 706.

30. 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992).

31. *Id.* at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting).

32. *Id.* at 509-10, 593 N.E.2d at 1350-51, 583 N.Y.S.2d at 942-43.

33. *Id.* at 511, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943.

particular United States Supreme Court decision and interpretation."[34]

The concurring opinion by Judge Kaye took issue both with the tone and conclusions of the dissent and, ultimately, with its methodological assertions. Judge Kaye wrote:

> First, however much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down judgments as to whether a particular protection is adequate or sufficient . . . .
>
> . . . .
>
> Second, I disagree with the dissent that, in an evolving field of constitutional rights, a methodology must stand as an ironclad checklist to be rigidly applied on pain of being accused of lack of principle or lack of adherence to stare decisis. . . . [W]here we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law -- wherever that may fall on the checklist.[35]

While *Scott* and *Keta* indisputably set forth the positions in the methodological debate, the place of *P.J. Video* methodology in the court's jurisprudence remains unclear. Though *P.J. Video* and its progeny were never formally rejected or limited, Judge Simons later conceded that the court had not settled on a uniform methodology for guiding its state constitutional interpretations.[36] Tellingly, in doing so he did not specifically advocate a reaffirmance of the *P.J. Video* framework, but rather called on the court to adopt some methodology -- whatever it may be -- to bring order its constitutional decision-making.

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34. *Id.* at 513, 593 N.E.2d at 1353, 583 N.Y.S.2d at 945.

35. *Id.* at 504, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

36. *Immuno*, 77 N.Y.2d at 263 n. 2, 567 N.E.2d 1270, 1286 n. 2, 566 N.Y.S.2d 906, 922 n. 2 (Simons, J., concurring).

THE "FEDERAL FLOOR" AND STATE CONSTITUTIONAL RESTRAINT

The second half of Judge Simons' philosophy of restraint centers not on the *how* of state constitutional analysis, but on the *when* and *whether*. Beginning in 1987 with a concurrence in *Patchogue-Medford Congress of Teachers v. Board of Education*,[37] Judge Simons advocated that the court of appeals refrain from deciding any issue as a matter of state constitutional law unless and until it was certain that the relief sought was not available as a matter of federal constitutional law. At issue was perhaps the most significant procedural issue raised by the new judicial federalism: whether a state constitutional ruling should be rendered when relief under the Federal Constitution is available. The question most clearly arises when the extent of federal protection for a right is uncertain, and the court of appeals is disposed to find that the state constitution affords protection in any event. Should only the state question be resolved by the court, thereby bringing the litigation to an end, irrespective of federal law? Or should the court of appeals render a federal law opinion first and, if favorable to the party asserting protection of a right, make no state finding unless the Supreme Court reverses and remands? Or, alternatively, should both federal and state law decisions be rendered -- the so-called "dual" approach?

Consistent with his view that the state constitution should be approached with judicial restraint, Judge Simons saw the court's first duty as participating in the interpretation and determination of federal law. His view flowed from the basic precept that the United States Constitution created, in the words of Justice Brennan, a "federal floor" of protection below which the states could not go, but above which they were free to create enhanced individual rights.[38] "That being so," Judge Simons wrote in *Patchogue-Medford*, "it would seem desirable, for the sake of

37. 70 N.Y.2d at 71, 510 N.E.2d at 331, 517 N.Y.S.2d at 463.
38. *Id.* at 72, 510 N.E.2d at 332, 517 N.Y.S.2d at 463-64.

uniformity, that we first determine that 'floor' when we are asked to do so."[39]

It was not until four years later, in *Immuno AG v. Moor-Jankowski*, that he gave fuller expression to that view and made plain that more than a concern for uniformity is at stake. *Immuno*, besides being one of the court's most important free speech decisions, brought into sharp focus the divisions within the court over the proper interplay between federal and state constitutional analyses.

At issue in *Immuno* was whether certain statements in a letter to the editor could be construed as assertions of fact and therefore actionable in a defamation suit. The court had earlier ruled in favor of the defendant, but the matter was then remanded by the United States Supreme Court for reconsideration following its decision in *Milkovich v. Lorain Journal Co.*[40] While the New York Court of Appeals was unanimous on remand in again finding for the defendant, the decision spawned three concurrences, principally on the issue of whether state law, federal law, or both should provide the basis for the outcome. In her opinion for the court, Judge Kaye embraced the dual approach, analyzing the issue under both the federal and state constitutions, and concluding that the defendant should prevail under both.[41] Judge Titone contended that state law alone should be employed.[42] Judges Simons and Hancock, in separate concurrences, advocated that the case be resolved solely on federal grounds.[43]

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39. *Id.*, 510 N.E.2d at 332, 517 N.Y.S.2d at 464.

40. The procedural history is summarized in Judge Kaye's majority opinion. *See* 77 N.Y.2d at 239-40, 567 N.E.2d at 1271-72, 566 N.Y.S.2d at 907-08. *See also, Milkovich*, 497 U.S. 1 (1990).

41. For Judge Kaye's brief summary of the various views expressed by the court, see *Immuno*, 77 N.Y.2d at 256 n.6, 567 N.E.2d at 1282 n.6, 566 N.Y.S.2d at 918 n.6.

42. *Id.* at 263, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922 (Titone, J., concurring).

43. *Id.* at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918 (Simons, J., concurring); *id.* at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 926 (Hancock, J., concurring).

Judge Simons' concurrence in *Immuno* revisited *Patchogue-Medford's* "federal floor" theme and articulated new and broader concerns about the need for judicial restraint by a state's highest court as a matter of appropriate federalism. Judge Simons' opinion begins by acknowledging that the court's primary role is to address and determine New York state law, but he says other considerations must be weighed as well:

> When the Court reviews a question of Federal constitutional law . . . it acts as part of a larger judicial system embracing not only New York but the Nation as a whole. When Federal questions are presented, its institutional functions are subordinated to the Supreme Court and it acts, in effect, as an intermediate Court.[44]

It follows from that, Judge Simons asserted, that the Supreme Court should have the opportunity to review pronouncements on federal law, consistent with its ultimate responsibility for determining federal law.[45] That becomes impossible under the dual-constitution approach taken by the court in *Immuno*, Judge Simons points out. While the decision interpreted federal law, it then fully and finally decided the matter on independent state grounds that are unreviewable by a federal court, thus preventing Supreme Court review of the federal interpretation.[46] Conversely, by finding in favor of the defendant on state grounds after first fully deciding in his favor on federal grounds, the court's state law determination becomes unnecessary dicta and violates the first principle of judicial restraint, *i.e.*, that a court should decide no more than necessary to resolve the dispute presented.[47] In sum, Judge Simons said, the natural growth and evolution of law through appellate review was frustrated when, as a matter of procedure, rightful appellate review was denied and the precedential effect of the court's decisions was rendered uncertain.

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44. *Id.* at 260-61; 567 N.E.2d at 1285; 566 N.Y.S.2d at 921.
45. *Id.*
46. *Id.* at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921.
47. *Id.*

Judge Simons' concurrence acknowledged the practical problems posed for litigants by his "federal floor" approach. Defendants might come before the court of appeals and prevail on federal grounds, only to lose before the United States Supreme Court. They would then have to undergo a second and possibly protracted round of appellate practice in the state courts to determine the very same claim on state constitutional grounds. Those concerns were particularly profound in *Immuno*, which had already been before the court once and involved events dating back nearly eight years. Nonetheless, Judge Simons wrote, concerns about judicial economy are present in every case, and they "rarely justify overriding established rules of judicial restraint."[48] The larger and dispositive concern, in Judge Simons' view, was to assure the orderly operation of the appellate process, or, as he put it, to maintain "our institutional responsibility to provide stability and certainty in the development of law."[49]

Interestingly, in two later decisions that he wrote for the full court, Judge Simons employed his "federal floor" approach, although neither case rekindled the debate of *Immuno* or directly addressed dualism. In a free speech case that came before the court shortly after *Immuno* and involved similar issues, Judge Simons rested his unanimous opinion on federal constitutional law, although the opinion acknowledges that the same result would arise under state law as a result of *Immuno*.[50] "No useful purpose would be served in articulating the differences between the two approaches when the defendant is able to prevail under the narrower Federal test," he wrote for the court.[51] Similarly, in *Lee TT v. Dowling*, which voided state procedures used to compile a register of persons accused of child abuse, the court relied solely on federal due process grounds and declined to

48. *Id.* at 263, 567 N.E.2d at 1286, 566 N.Y.S.2d at 922.

49. *Id.*

50. 600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130, 145, 603 N.E.2d 930, 938, 589 N.Y.S.2d 825, 833 (1992).

51. *Id.*

consider petitioners' companion state constitutional argument.[52] In contrast to the court's *Immuno* methodology, the *Lee TT* court held: "Inasmuch as we conclude that the relief petitioners requested is warranted under Federal constitutional principles, we have no occasion to consider whether the Due Process Clause of the State Constitution guarantees even broader protection."[53]

BEHIND THE JURISPRUDENCE OF RESTRAINT

Given his strong preference for narrowly focused, closely reasoned opinions, it is not surprising that none of Judge Simons' writings fully explores the deeper question posed by his state constitutional jurisprudence: why *should* the court of appeals have a heightened concern about judicial restraint in approaching the state's own constitution? After all, it is the court's highest duty to determine New York law, and the court's right to interpret the state constitution is unassailable. Moreover, the constitution is a powerful tool for shaping law at the court of appeals. No further appeal lies for all practical purposes, no statute can reverse the decision, and the issues raised and decided fundamentally shape the lives of New York citizens. As such, it represents one of the court's greatest opportunities to influence law and policy. At the same time, the document itself is a cornerstone in the federal scheme envisioned by the Federal Constitution, and a vital, evolving state constitution would seem to be critical to meaningful federalism.

A close reading of Judge Simons' opinions makes clear that none of those points has been lost. As decisions like *P.J. Video* and *Harris* demonstrate, he was willing to turn to the state constitution and use it in groundbreaking ways when he discerned that the law and circumstances warranted. But it is also clear that he harbored a deep concern that the state constitution could be

52. Lee TT v. Dowling, 87 N.Y.2d 699, 713, 664 N.E.2d 1243, 1252-53, 642 N.Y.S.2d 181, 190-91 (1996).

53. *Id.*

misused as a tool of arbitrary judicial fiat unless the court, through its decision-making processes, was willing to exercise an appropriate degree of self-restraint.

In part, that view reflects a broader philosophy of judging that marked Judge Simons' writing, whether about constitutional, common law, or statutory issues. He believed that courts should decide the cases before them, nothing more and nothing less, and should do so on the basis of law and not personal preference or ideological disagreement. His view of the law was not naive; he understood that judging was, in the end, a human undertaking subject to the normal human frailties. But he believed that the decisional process itself -- for example, adherence to precedent, stare decisis, and jurisdictional doctrines such as preservation and reviewability -- if abided by, legitimized a court's authority, made its decisions institutional and sustaining, and prevented misapplication of the judicial power.

As much as those general considerations are present throughout his opinions, one senses in Judge Simons' writings a heightened concern for the issue of judicial restraint in state constitutional analysis. It is not difficult to speculate on why that might be so. The state constitution differs from both the Federal Constitution and the common law in ways that are central to the decisional process and the restraint it imposes. There are comparatively few precedents for many of the state constitutional questions and significantly less scholarship to illuminate the text. The state constitution has little tradition of analysis to which a court can turn to find general principles of construction. And it is frequently called upon by litigants, not because there is any colorable argument based on prior interpretations of the relevant provision, but solely because the litigant disagrees with the federal precedents and wants a second bite of the constitutional apple. In significant ways, the state constitution is a largely blank slate, free of the decisional process restraints that impose limits on the court in other areas. At the same time, the court's interpretations of the state constitution are not subject to the usual sources of accountability, specifically, appellate review and legislative reversal. In short, the power of the court is

unparalleled and the normal restraints are largely absent when it turns to the state constitution.

But Judge Simons' concern, it seems, was not that the court would use that expansive power to render improvident decisions. Instead, he was addressing a more fundamental institutional concern: that even worthy decisions, to the extent they appear to be merely the personal preferences of the judges who happen to be on the bench at that time and subject to change when new judges come along, undermine the court's legitimacy in the eyes of litigants, the bar, and the public at large. These "doubts about our processes"[54] say nothing about the wisdom of any particular decision, but instead speak to whether the court as an institution acts in a manner that preserves the respect and authority that it needs in order to be not merely powerful, but legitimate as well.

It is safe to say that, at Judge Simons' retirement, the issues of uniform methodology and constitutional dualism remain unresolved for the court of appeals. However, irrespective of whether his views ultimately prevail, his sustaining contribution to the court, and to the development of state constitutional law, will be his clear and principled insistence that the court pay heed to the issue of institutional integrity as it broke new constitutional ground. As his decisions suggest, the long-term impact of the revolution in state constitutional law may ultimately, and ironically, depend on how well the court safeguards some of its most venerable traditions.

54. *See supra* notes 5 and 23 and related text.